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§ 1.1446-7 EFFECTIVE/APPLICABILITY DATE..

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§ 1.1446-1 Withholding tax on foreign partners' share of effectively connected taxable income.

(a) *In general.* If a domestic or foreign partnership has effectively connected taxable income (ECTI) as computed under § 1.1446-2 for any partnership tax year, and any portion of such taxable income is allocable under section 704 to a foreign partner, then the partnership must pay a withholding tax under section 1446 (1446 tax) at the time and in the manner prescribed in this section, and §§ 1.1446-2 through 1.1446-6.

(b) *Steps in determining 1446 tax obligation.* In general, a partnership determines its 1446 tax as follows. The partnership determines whether it has any foreign partners in accordance with paragraph (c) of this section. If the partnership does not have any foreign partners (including any person presumed to be foreign under paragraph (c) of this section and any domestic trust treated as foreign under § 1.1446-3(d)) during its taxable year, it generally will not have a 1446 tax obligation. If the partnership has one or more foreign partners, it then determines under § 1.1446-2 whether it has ECTI any portion of which is allocable under section 704 to one or more of the foreign partners. If the partnership has ECTI allocable under section 704 to one or more of its foreign partners, the partnership computes its 1446 tax, pays over 1446 tax, and reports the amount paid in accordance with the rules in § 1.1446-3. For special rules applicable to publicly traded partnerships, see § 1.1446-4. For special rules applicable to tiered partnership structures, see § 1.1446-5. For special rules that may apply in determining the amount of 1446 tax due with respect to a partner, see § 1.1446-6.

(c) *Determining whether a partnership has a foreign partner—(1) In general.* Except as otherwise provided in this section, § 1.1446-3, and § 1.1446-5, only a partnership that has at least one foreign partner during the partnership's taxable year can have a 1446 tax liability. Generally, the term foreign partner means any partner of the partnership that is not a U.S. person within the meaning of section 7701(a)(30). Thus, a partner of the partnership is generally a foreign partner if the partner is a nonresident alien, foreign partnership (see § 1.1446-5 for rules that allow a lower-tier partnership to look through an upper-tier foreign partnership to the partners of such partnership for purposes of computing its 1446 tax), foreign corporation (which includes a foreign government pursuant to section 892(a)(3)), foreign estate or trust (see paragraph (c)(2) of this section for rules that instruct a partnership to consider the grantor or other owner of a trust under subpart E of

subchapter J as the partner for purposes of computing the partnership's 1446 tax), as those terms are defined under section 7701 and the regulations thereunder, or a foreign organization described in section 501(c), or other foreign person. A person also is a foreign partner if the person is presumed to be a foreign person under paragraph (c)(3) of this section. For purposes of this section, a partner that is treated as a U.S. person for all income tax purposes (by election or otherwise, see e.g., sections 953(d) and 1504(d)) will not be a foreign partner, provided the partner has provided the partnership a valid Form W-9, "Request for Taxpayer Identification Number and Certification," or the partnership uses other means to determine that the partner is not a foreign partner (see paragraph (c)(3) of this section). A partner that is treated as a U.S. person only for certain specified purposes is considered a foreign partner for purposes of section 1446, and a partnership must pay 1446 tax on the portion of ECTI allocable to that partner. For example, a partnership must generally pay 1446 tax on ECTI allocable to a foreign corporate partner that has made an election under section 897(i).

(2) *Submission of Forms W-8BEN, W-8IMY, W-8ECI, W-8EXP, and W-9*—(i) *In general.* Except as otherwise provided in this paragraph (c)(2) or paragraph (c)(3) of this section, a partnership must generally determine whether a partner is a foreign partner, and the partner's tax classification (e.g., corporate or non-corporate), by obtaining a withholding certificate from the partner that is a Form W-8BEN, "Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding," Form W-8IMY, "Certificate of Foreign Intermediary, Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding," Form W-8ECI, "Certificate of Foreign Person's Claim for Exemption from Withholding on Income Effectively Connected With the Conduct of a Trade or Business in the United States," Form W-8EXP, "Certificate of Foreign Government or other Foreign Organization for United States Tax Withholding," or a Form W-9, as applicable, or an acceptable substitute form

permitted under paragraph (c)(5) of this section. Generally, a foreign partner that is a nonresident alien, a foreign estate or trust (other than a grantor trust described in this paragraph (c)(2)), a foreign corporation, or a foreign government should provide a valid Form W-8BEN.

(ii) *Withholding certificate applicable to each type of partner.* A partner that submits a valid Form W-8 (e.g., Form W-8BEN) for purposes of section 1441 or 1442 will generally satisfy the documentation requirements of this section provided that the submission of such form is not inconsistent with the rules of this paragraph (c)(2) or paragraph (c)(3) of this section. The following rules shall apply for purposes of this section.

(A) *U.S. person.* A partner that is a U.S. person (other than a grantor trust described in this paragraph (c)(2)), including a domestic partnership and domestic simple or complex trust (including an estate), shall provide a valid Form W-9.

(B) *Nonresident alien.* A Form W-8 (e.g., Form W-8BEN) submitted by a nonresident alien for purposes of withholding under section 1441 will generally be accepted for purposes of section 1446. If no such form is submitted for purposes of section 1441, such nonresident alien shall submit Form W-8BEN for purposes of section 1446.

(C) *Foreign partnership.* A partner that is a foreign partnership generally shall provide a valid Form W-8IMY for purposes of section 1446. See § 1.1446-5 (permitting a lower-tier partnership to look through an upper-tier foreign partnership in certain circumstances when computing 1446 tax).

(D) *Disregarded entities.* An entity that is disregarded as an entity separate from its owner under § 301.7701-3 of this chapter (whether domestic or foreign) shall not submit a Form W-8 (e.g., Form W-8BEN) or Form W-9. Instead, the owner of such entity for Federal tax purposes shall submit appropriate documentation to comply with this section. See §§ 301.7701-1 through 301.7701-3 of this chapter for determining the U.S. Federal tax classification of a partner.

(E) *Domestic and foreign grantor trusts.* To the extent that a grantor or other

person is treated as the owner of any portion of a trust under subpart E of subchapter J of the Internal Revenue Code, such trust shall provide documentation under this paragraph (c)(2) to identify the trust as a grantor trust and provide documentation on behalf of the grantor or other person treated as the owner of all or a portion of such trust as required by this paragraph (c)(2). If such trust is a foreign trust, the trust shall submit Form W-8IMY to the partnership identifying itself as a foreign grantor trust and shall provide such documentation (e.g., Forms W-8BEN, W-8IMY, W-8ECI, W-8EXP, or W-9) and information pertaining to its grantor or other owner to the partnership that permits the partnership to reliably associate (within the meaning of § 1.1441-1(b)(2)(vii)) such portion of the trust's allocable share of partnership ECTI with the grantor or other person that is the owner of such portion of the trust. If such trust is a domestic trust, the trust shall furnish the partnership a statement under penalty of perjury that the trust is, in whole or in part, a domestic grantor trust and such statement shall identify that portion of the trust that is treated as owned by a grantor or another person under subpart E of subchapter J of the Internal Revenue Code. The trust shall also provide such documentation and information (e.g., Forms W-8BEN, W-8IMY, W-8ECI, W-8EXP, or W-9) pertaining to its grantor or other owner(s) to the partnership that permits the partnership to reliably associate (within the meaning of § 1.1441-1(b)(2)(vii)) such portion of the trust's allocable share of partnership ECTI with the grantor or other person that is the owner of such portion of the trust.

(F) *Nominees.* Where a nominee holds an interest in a partnership on behalf of another person, the beneficial owner of the partnership interest, not the nominee, shall submit a Form W-8 (e.g., Form W-8BEN) or Form W-9 to the partnership or nominee that is the withholding agent.

(G) *Foreign governments, foreign tax-exempt organizations and other foreign persons.* A Form W-8 (e.g., Form W-8EXP) submitted by a partner that is a foreign government, foreign tax-exempt organization, or other foreign

person for purposes of withholding under §§ 1441 through 1443 will also operate to establish the foreign status of such partner under this section. However, except as set forth in § 1.1446-3(c)(3) (regarding certain tax-exempt organizations described in section 501(c)), the submission of Form W-8EXP will have no effect on whether there is a 1446 tax due with respect to such partner's allocable share of partnership ECTI. For example, a partnership must still pay 1446 tax with respect to a foreign government partner's allocable share of ECTI because such partner is treated as a foreign corporation under section 892(a)(3). If no Form W-8 is submitted for purposes of withholding under sections 1441 through 1443, then such government, tax-exempt organization, or person must generally submit Form W-8BEN.

(H) *Foreign corporations, certain foreign trusts, and foreign estates.* Consistent with the rules of this paragraph (c)(2) and paragraph (c)(3) of this section, a foreign corporation, a foreign trust (other than a foreign grantor trust described in paragraph (c)(2)(ii)(E) of this section), or a foreign estate may generally submit any appropriate Form W-8 (e.g., Form W-8BEN) to the partnership to establish its foreign status for purposes of section 1446.

(iii) *Effect of Forms W-8BEN, W-8IMY, W-8ECI, W-8EXP, W-9, and statement—*
(A) *Partnership reliance on withholding certificate.* In general, for purposes of this section, a partnership may rely on a valid Form W-8 (e.g., Form W-8BEN) or Form W-9, or statement described in this paragraph (c)(2) from a partner, beneficial owner, or grantor trust to determine whether that person, beneficial owner, or the owner of a grantor trust, is a non-foreign or foreign partner for purposes of computing 1446 tax, and if such person is a foreign partner, to determine whether or not such person is a corporation for U.S. tax purposes. The rules of paragraph (c)(3) of this section shall apply to a partnership that receives a Form W-8IMY from a foreign grantor trust or a statement described in this paragraph (c)(2) from a domestic grantor trust, but does not receive a Form W-8 (e.g., Form W-8BEN) or Form W-9 identifying such

grantor or other person. Further, a partnership may not rely on a Form W-8 or Form W-9, or statement described in this paragraph (c)(2), and such form or statement is therefore not valid for any installment period or Form 8804 filing date during which the partnership has actual knowledge or has reason to know that any information on the withholding certificate or statement is incorrect or unreliable and, if based on such knowledge or reason to know, the partnership should pay 1446 tax in an amount greater than would be the case if it relied on the certificate or statement.

(B) *Reason to know.* A partnership has reason to know that information on a withholding certificate or statement is incorrect or unreliable if its knowledge of relevant facts or statements contained on the form or other documentation is such that a reasonably prudent person in the position of the withholding agent would question the claims made. See §§1.1441-1(e)(4)(viii) and 1.1441-7(b)(1) and (2).

(C) *Subsequent knowledge and impact on penalties.* If the partnership does not have actual knowledge or reason to know that a Form W-8BEN, Form W-8IMY, Form W-8ECI, Form W-8EXP, Form W-9, or statement received from a partner, beneficial owner, or grantor trust contains incorrect or unreliable information, but it subsequently determines that the certificate or statement contains incorrect or unreliable information, and, based on such knowledge the partnership should pay 1446 tax in an amount greater than would be the case if it relied on the certificate or statement, then the partnership will not be subject to penalties for its failure to pay the 1446 tax in reliance on such certificate or statement for any installment payment date prior to the date that the determination is made. See §§1.1446-1(c)(4) and 1.1446-3 concerning penalties for failure to pay the withholding tax when a partnership knows or has reason to know that a withholding certificate or statement is incorrect or unreliable.

(iv) *Requirements for certificates to be valid.* Except as otherwise provided in this paragraph (c), for purposes of this section, the validity of a Form W-9 shall be determined under section 3406

and §31.3406(h)-3(e) of this chapter which establish when such form may be reasonably relied upon. A Form W-8BEN, Form W-8IMY, Form W-8ECI, or Form W-8EXP is only valid for purposes of this section if its validity period has not expired, the partner submitting the form has signed it under penalties of perjury, and it contains all the required information.

(A) *When period of validity expires.* For purposes of this section, a Form W-8BEN, Form W-8IMY, Form W-8ECI, or Form W-8EXP submitted by a partner shall be valid until the end of the period of validity determined for such form under §1.1441-1(e). With respect to a foreign partnership submitting Form W-8IMY, the period of validity of such form shall be determined under §1.1441-1(e) as if such foreign partnership submitted the form required of a nonwithholding foreign partnership. See §1.1441-1(e)(4)(ii).

(B) *Required information for Forms W-8BEN, W-8IMY, W-8ECI, and W-8EXP.* Forms W-8BEN, W-8IMY, W-8ECI, and W-8EXP submitted under this section must contain the partner's name, permanent address and Taxpayer Identification Number (TIN), the country under the laws of which the partner is formed, incorporated or governed (if the person is not an individual), the classification of the partner for U.S. Federal tax purposes (e.g., partnership, corporation), and any other information required to be submitted by the forms or instructions for such form, as applicable.

(v) *Partner must provide new withholding certificate when there is a change in circumstances.* The principles of §1.1441-1(e)(4)(ii)(D) shall apply when a change in circumstances has occurred (including situations where the status of a U.S. person changes) that requires a partner to provide a new withholding certificate.

(vi) *Partnership must retain withholding certificates.* A partnership or nominee who has responsibility for paying 1446 tax under this section or §1.1446-4 must retain each withholding certificate, statement, and other information received from its direct and indirect partners for as long as it may be relevant to the determination of the withholding agent's 1446 tax liability

under section 1461 and the regulations thereunder.

(3) *Presumptions in the absence of valid Form W-8BEN, Form W-8IMY, Form W-8ECI, Form W-8EXP, Form W-9, or statement.* Except as otherwise provided in this paragraph (c)(3), a partnership that does not receive a valid Form W-8BEN, Form W-8IMY, Form W-8ECI, Form W-8EXP, Form W-9, or statement required by paragraph (c)(2) of this section from a partner, beneficial owner, or grantor trust, or a partnership that receives a withholding certificate or statement but has actual knowledge or reason to know that the information on the certificate or statement is incorrect or unreliable, must presume that the partner is a foreign person. Except as provided in § 1.1446-3(a)(2) and § 1.1446-5(c)(2), a partnership that knows that a partner is an individual shall treat the partner as a non-resident alien. Except as provided in § 1.1446-3(a)(2) and § 1.1446-5(c)(2), a partnership that knows that a partner is an entity shall treat the partner as a corporation if the entity is a corporation as defined in § 301.7701-2(b)(8) of this chapter. See § 1.1446-3(a)(2) which prohibits a partnership in certain circumstances from considering preferential tax rates in computing its 1446 tax when the presumption and rules of this paragraph (c)(3) apply. In all other cases, the partnership shall treat the partner as either a nonresident alien or a foreign corporation, whichever classification results in a higher 1446 tax being due, and shall pay the 1446 tax in accordance with this presumption. Except as provided in § 1.1446-5(c)(2), the presumption set forth in this paragraph (c)(3) that a partner is a foreign person shall not apply to the extent that the partnership relies on other means to ascertain the non-foreign status of a partner and the partnership is correct in its determination that such partner is a U.S. person. A partnership is in no event required to rely upon other means to determine the non-foreign status of a partner and may demand that a partner furnish an acceptable certificate under this section. If a certificate is not provided in such circumstances, the partnership may presume that the partner is a foreign partner, and for purposes of sections 1461

through 1463, will be considered to have been required to pay 1446 tax on such partner's allocable share of partnership ECTI.

(4) *Consequences when partnership knows or has reason to know that Form W-8BEN, Form W-8IMY, Form W-8ECI, Form W-8EXP, or Form W-9 is incorrect or unreliable and does not withhold.* If a partnership has actual knowledge or has reason to know that a Form W-8BEN, Form W-8IMY, Form W-8ECI, Form W-8EXP, Form W-9, or statement required by paragraph (c)(2) of this section submitted by a partner, beneficial owner, or grantor trust contains incorrect or unreliable information (either because the certificate or statement when given to the partnership contained incorrect information or because there has been a change in facts that makes information on the certificate or statement incorrect), and the partnership pays less than the full amount of 1446 tax due on ECTI allocable to that partner, the partnership shall be fully liable under section 1461 and § 1.1461-3 (§ 1.1461-1 for publicly traded partnerships subject to § 1.1446-4) and § 1.1446-3, and for all applicable penalties and interest, for any failure to pay the 1446 tax for the period during which the partnership has such knowledge or reason to know that the certificate contained incorrect or unreliable information and for all subsequent installment periods. If a partner, beneficial owner, or grantor trust submits a new valid Form W-8BEN, Form W-8IMY, Form W-8ECI, Form W-8EXP, Form W-9, or statement, as applicable, the partnership may rely on that documentation when paying 1446 tax (or any installment of such tax) for any payment date that has not passed at the time such form is received.

(5) *Acceptable substitute form.* A partnership or withholding agent responsible for paying 1446 tax (or any installment of such tax) may substitute its own form for the official version of Form W-8 (e.g., Form W-8BEN) that is recognized under this section to ascertain the identity of its partners, provided such form is consistent with § 1.1441-1(e)(4)(vi). All references under this section or §§ 1.1446-2 through 1.1446-6 to a Form W-8 (e.g., Form W-8BEN, Form W-8IMY, Form W-8ECI,

Form W-8EXP) shall include the acceptable substitute form recognized under this paragraph (c)(5).

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§ 1.1446-2 Determining a partnership's effectively connected taxable income allocable to foreign partners under section 704.

(a) *In general.* A partnership's effectively connected taxable income (ECTI) is generally the partnership's taxable income as computed under section 703, with adjustments as provided in section 1446(c) and this section, and computed with consideration of only those partnership items which are effectively connected (or treated as effectively connected) with the conduct of a trade or business in the United States. For purposes of determining the section 1446 withholding tax (1446 tax) or any installment of such tax under § 1.1446-3, partnership ECTI allocable under section 704 to foreign partners is the sum of the allocable shares of ECTI of each of the partnership's foreign partners as determined under paragraph (b) of this section. See § 1.1446-6 (special rules permitting the partnership to consider partner-level deductions and losses to reduce the partnership's 1446 tax). The calculation of partnership ECTI allocable to foreign partners as set forth in paragraph (b) of this section and the partnership's withholding tax obligation are partnership-level computations solely for purposes of determining the 1446 tax. Therefore, any deduction that is not taken into account in calculating a partner's allocable share of partnership ECTI (e.g., percentage depletion), but which is a deduction that under U.S. tax law the foreign partner is otherwise entitled to claim, can still be claimed by the foreign partner when computing its U.S. tax liability and filing its U.S. income tax return, subject to any restriction or limitation that otherwise may apply.

(b) *Computation.*—(1) *In general.* A foreign partner's allocable share of partnership ECTI for the partnership's taxable year that is allocable under section 704 to a particular foreign partner is equal to that foreign partner's dis-

tributive share of partnership gross income and gain for the partnership's taxable year that is effectively connected and properly allocable to the partner under section 704 and the regulations thereunder, reduced by the foreign partner's distributive share of partnership deductions for the partnership taxable year that are connected with such income under section 873(a) or 882(c) and properly allocable to the partner under section 704 and the regulations thereunder, in each case, after application of the rules of this section. See § 1.1446-6 (special rules permitting the partnership to consider partner-level deductions and losses to reduce the partnership's 1446 tax). For these purposes, a foreign partner's distributive share of effectively connected gross income and gain and the deductions connected with such income shall be computed by considering allocations that are respected under the rules of section 704 and § 1.704-1(b)(1), including special allocations in the partnership agreement (as defined in § 1.704-1(b)(2)(ii)(h)), and adjustments to the basis of partnership property described in section 743 pursuant to an election by the partnership under section 754 (see § 1.743-1(j)). The character of effectively connected partnership items (capital versus ordinary) shall be separately considered only to the extent set forth in paragraph (b)(3)(v) of this section and, when applicable, sections 1.1446-3(a)(2) (consideration of preferential rates when computing 1446 tax) and section 1.1446-6 (special rules permitting the partnership to consider partner-level deductions and losses to reduce the partnership's 1446 tax).

(2) *Income and gain rules.* For purposes of computing a foreign partner's allocable share of partnership ECTI under this paragraph (b), the following rules shall apply with respect to partnership income and gain.

(i) *Application of the principles of section 864.* The determination of whether a partnership's items of gross income are effectively connected shall be made by applying the principles of section 864 and the regulations thereunder.

(ii) *Income treated as effectively connected.* A partnership's items of gross income that are effectively connected include any income that is treated as